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90-808

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STANLEY PLESINSKI,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appointments Clause (Article II, Section 2, Clause 2) requires the appointment of a Special Assistant United States Attorney, an inferior officer, by the "head of the department", the Attorney General?

2. Whether 28 U.S.C. §510 can be construed to permit the appointment of an inferior officer by a fourth echelon official of the Department of Justice in light of the Constitutional requirement of appointment by the head of the department?

3. Whether the method of appointment of a Special Assistant United States Attorney by the "Deputy Director of the Office of Attorney Personnel Management" violates the Appointments Clause, and this Court's holdings in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Morrison v. Olson*, 487 U.S. 654 (1988)?

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IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTORY STATEMENT

The Appointments Clause (Article II, Section 2, Clause 2) sets out the Constitutionally prescribed method for appointing "officers" of the United States. A Special Assistant U.S. Attorney acting under 28 U.S.C. § 543 is an "inferior" officer of the United States. The Constitutional method of appointment which requires appointment by the "head of the department" must therefore be used in appointing such Special Assistant U.S. Attorney. The prosecutor in this case was not appointed in accordance with the Constitutionally prescribed procedure. The Court of Appeals opinion sanctions an improper procedure, one in which the appointment was made, not by the "head of the department" as required, but by a lower echelon official to whom there has been delegation and subdelegation of the appointment power. Petitioner requests that a writ of

certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in *United States v. Stanley Plesinski*, No. 89-50206.

OPINION IN THE COURT BELOW

The opinion of the Court of Appeals affirming the conviction of Petitioner is officially reported at 912 F.2d 1033 (9th Cir. 1990). A copy of the opinion is attached as Appendix "A".

STATEMENT OF JURISDICTION

On 10 August 1990, the Court of Appeals entered judgment affirming the conviction of Petitioner in this case. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause of the Constitution, Article II, Section 2 provides as follows:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

28 U.S.C. 543 provides:

> (a) The Attorney General may appoint attorneys to assist the United States Attorney when the public interest so requires.

(b) Each attorney appointed under this section is subject to removal by the Attorney General.

28 U.S.C. § 510 provides:

> The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

STATEMENT OF THE CASE

Petitioner Stanley Plesinski was charged on 18 May 1988 in a four count indictment with offenses related to the possession with intent to distribute marijuana. Sanford Feldman, a Deputy Attorney General for the State of California, participated in the U.S. District Court for the Central District of California (Santa Ana Division) in the indictment, prosecution, and sentencing of Plesinski. Feldman alone represented the prosecution at the sentencing of Mr. Plesinski, and it was Feldman who conducted all of the trial of the co-defendant Jacob Vinograd, albeit in the presence of an Assistant U.S. Attorney.

On 20 December 1988, petitioner Plesinski moved to dismiss the indictment, or in the alternative to disqualify Feldman. Mr.Plesinski based his motion on the defective appointment of Feldman, a Special Assistant U.S. Attorney and "inferior officer" of the United States, because that appointment had not been made according to the procedure required by the Appointments Clause of the United States Constitution. On 6 February 1989, the Court denied Mr. Plesinski's motion to dismiss the indictment or to disqualify Feldman. Thereafter, on 8 February 1989, Mr. Plesinski entered a conditional plea of guilty pursuant Federal Rule of Criminal Procedure 11(a)(2) to one count of the indictment, preserving his right to appeal the denial of the motion to dismiss or disqualify Feldman. The remaining counts of the indictment were dismissed. On 3 April 1989, Feldman appeared alone on behalf of the

government at the sentencing of Mr. Plesinski. Mr. Plesinski renewed his objection to the participation of Feldman, and renewed the motion for disqualification. The district court denied this motion. On that same date, the court sentenced Mr. Plesinski to a sentence of nine years imprisonment pursuant to 18 U.S.C. § 4205(b)(2). Mr. Plesinski timely appealed to the Court of Appeals for the Ninth Circuit.

The primary basis for Petitioner Plesinski's objection to Feldman's participation in this federal criminal prosecution was that Feldman was not authorized to participate in the prosecution because he was not appointed by the Attorney General as Constitutionally required to serve as a Special Assistant U.S. Attorney. Feldman was initially appointed as a Special Assistant U.S. Attorney by one Brian Meyers, Deputy Director of the Office of Attorney Personnel Management for the Department of Justice, on 19 September 1986. Thereafter Meyers extended Feldman's appointment on 1 April 1987, to a period through April 30, 1988. The appointment was extended again on 2 May 1988, by Meyers' successor as Deputy Director, one Mark Wilkoff. That appointment was extended to 30 April 1989. The Deputy Director of the Office of Attorney Personnel Management is the subaltern of the Director, Linda Cinciotta, who is herself a subordinate of the Deputy Attorney General and the Assistant Attorney General.

The Deputy Director's alleged authority to appoint Special Assistant U.S. Attorneys was based on a 1981 Attorney General order which delegated to the Associate Attorney General the Attorney General's authority under 28 U.S.C. § 543 to appoint Special Attorneys to assist United States Attorneys. See 28 C.F.R. § 0.19(a)(1) (1981). The Associate Attorney General was in his turn authorized to "redelegate" that authority to the official in the office of Deputy Attorney General responsible for attorney personnel management. By written orders the Acting Associate Attorney General thereafter delegated the appointment authority which he had been given by the Attorney General to the Director of the Office of Personnel Management, Linda Cinciotta. Pursuant to another Attorney General order authorizing the director to convey that authority to her deputy director, (see 28 C.F.R.

§ 0.15(e)(2) (1985)), Cinciotta redelegated her authority to the various Deputy Directors in this case.

On 24 February 1988, the Attorney General issued an order which transferred the authority to appoint Special Assistant U.S. Attorneys from the Associate Attorney General back to the Deputy Attorney General. See 28 C.F.R. § 0.15(b)(1) (1988) While the regulations permitted the Deputy Attorney General to "redelegate "that authority to Cinciotta, the Deputy Attorney General did not do so until 31 January 1989. After the motion to dismiss was filed in this case on 9 February 1989, Feldman was "reappointed" as a Special Assistant U.S. Attorney by Director Cinciotta, pursuant to the 31 January 1989, redelegation of authority from the Deputy Attorney General.

REASONS FOR ALLOWANCE OF THE WRIT

A. BECAUSE A SPECIAL ASSISTANT U.S. ATTORNEY IS AN "INFERIOR" OFFICER OF THE UNITED STATES, HE OR SHE MUST BE APPOINTED IN THE MANNER PRESCRIBED BY THE APPOINTMENTS CLAUSE. THE "HEAD OF THE DEPARTMENT" MUST MAKE THE APPOINTMENT, NOT SOME LESSER EMPLOYEE ACTING PURSUANT TO A "DELEGATION".

A Special Assistant U.S. Attorney appointed under 28 U.S.C. § 543 exercises substantial federal authority, and under the criteria of this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), is an inferior officer of the United States. Since Article II, Section 2, Clause 2, (the Appointments Clause) of the Constitution sets forth the prescribed manner of appointment, in order to be validly appointed and in order to properly exercise federal authority, such a Special Assistant U.S. Attorney must be appointed by the head of the department as required by both the statute (28 U.S.C. § 543) and the Constitution.[1]

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[1]The Congress has statutorily defined both "department" and "officer". 5 U.S.C. § 101 sets forth the executive departments, which include the Department of Justice 5 U.S.C. § 2104 defines "officer" to include justices or judges of the United States and persons who are required by law to be appointed in the civil service by one of the following acting in an official

The broad language of 28 U.S.C. § 510 permitting the Attorney General to delegate his functions does not suffice to permit the delegation of the power of appointment of inferior officers for two reasons: First, the Congress did not intend to permit such a delegation in this instance. Second, assuming, arguendo, such a delegation could be permitted under 28 U.S.C. § 510, it would be to that extent be unconstitutional as applied by permitting an appointment of an inferior officer other than as prescribed by the Appointments Clause. This Court should grant the petition for writ of Certiorari because the Ninth Circuit decision upholding the delegation of the power of appointment to a fourth echelon official in the Department of Justice ignores the text and meaning of the Constitutional provision, and is in derogation of this Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Morrison v. Olson*, 487 U.S. 654 (1988).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court discussed the meaning of the Appointments Clause:

> The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States", but the drafters had a less frivolous purpose in mind. This conclusion is supported by language from *United States v. Germaine*, 99 U.S. 508, 509-510, 25 L.Ed. 42 (1879):
>
> > The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class

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capacity-- the president; a court of the United States; the head of an executive agency; or the secretary of the military department; which person is engaged in the performance of a federal function under the authority of law, or an executive act, and is subject to the supervision of authority of the President or the appointing agency, or the Judicial Conference of the United States while engaged in the performance of the duties of office. Of course, this Court has construed the Constitutional meaning of "department" in United States v. Germaine, 99 U.S. 508 510-511 (1879) and "officer" in Buckley v. Valeo, 424 U.S. 125-126 (1976) as "any appointee exercising significant authority pursuant to the laws of the United States".

> requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be little doubt. (Emphasis supplied)

> We think that the term "Officers of the United States" as used in Article II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine*, *supra*, is a term contended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must, therefore, be appointed in a manner prescribed by § 2, Cl. 2, of that Article. 424 U.S. at 125-126.

28 U.S.C. § 543 is an exercise of Congressional power under the Appointments Clause. It provides that the Attorney General may appoint attorneys to assist the United States Attorney when the public interest so requires. Section 543 is an exercise of the Appointments Clause because it is Congressional action vesting the power to appoint an "inferior officer" in the head of the department, in this case the Attorney General.

The decision below appears to hold that a Special Assistant U.S. Attorney is in fact an "inferior officer" for purposes of the Appointments Clause. There can be no dispute as to the correctness of this proposition. Such an official exercises significant authority pursuant to the laws of the United States. As a Federal prosecutor such an official exercises extensive prosecutorial discretion. The

power to enforce the criminal laws of the United States, and to obtain the conviction and imprisonment of citizens for violation of those laws, is indeed significant authority. Under the criteria of this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988) such an official is an "inferior" officer. The Special Assistant U.S. Attorney is subject to removal by a higher executive branch official, specifically the Attorney General. Such an official is empowered to perform only certain limited duties and the office is limited in jurisdiction. See *Morrison v. Olson*, 487 U.S. 654, 671-673 (1988). Such a characterization is also consistent with this Court's reference in *United States v. Nixon*, 418 U.S. 683, 694 (1974) to the office of the Watergate special prosecutor as a "subordinate officer".

Given that such a "special" Assistant U.S. Attorney is an inferior officer, under *Buckley v. Valeo*, 424 U.S. 1 (1976) such an officer must be appointed in a manner consistent with the Appointments Clause, that is by the head of the department. Because the Constitutional mode of appointment prescribes that the appointment be done by the "head of the department", the Court of Appeals erred in finding that Section 510 of Title 28 permits the Attorney General to delegate (and presumably the lower officials to "redelegate") the power of appointment down to the "Deputy Director of the Officer of Personnel Management" a fourth echelon employee of the Department of Justice. Such delegation is inconsistent with the Appointments Clause, this Court's previous holdings, the language of the statute, and the clear intent of Congress to limit the appointing authority to the Attorney General. The broad language of Section 510 should not be read to permit such a delegation. If it is read in such fashion, it is unconstitutional as applied to this case, because it would permit the appointment of an officer of the United States in a fashion not contemplated by the Appointments Clause.

THE LANGUAGE OF THE STATUTE

28 U.S.C. § 543 is an exercise of Congressional power under the Appointments Clause. The explicit use in the statute of the term "appoint" as opposed to some other language such as "retain" "employ" or "engage", coupled with the vesting of this power in the Attorney General

makes it clear that in passing Section 543, the Congress was exercising its power under the Appointments Clause. This unambiguous language clearly implicates both Congressional authority under the Appointments Clause, and the Constitutional provisions setting forth the particular manner by which inferior officers are to be appointed.

LEGISLATIVE HISTORY OF THE PREDECESSOR STATUTE

The debate surrounding the enactment of the predecessor statute of 28 U.S.C. § 543 makes clear the Congressional intention to invoke the Appointments Clause. The original statute in 1861 gave the Attorney General supervisory power of United States Attorneys, and authority to appoint attorneys to assist the Attorney General (Act of August 2, 1861, 12 Stat. 285 c.37 Rev. Stat. § 363) In 1870, in connection with legislation in establishing the Department of Justice, the debate on the legislation made clear the reason for having the Attorney General appoint such special attorneys himself. During the discussion for example, the following colloquy occurred in the House of Representatives.

> Mr. Jenckes. . .But the evil was in the fact that the necessity existed for going outside of the proper law force of the Government, that the Government could not always command the services of men of sufficient ability in learning to transact its law business. We believe that the addition of this officer would be sufficient to keep well in hand the business of the United States in its own courts. Of course he cannot perform all of the duties himself. In some cases extra counsel may be required, but the district attorneys with his assistants can generally perform these duties; and we provide that if the Attorney General under the authority given him by existing law, shall employ assistant counsel in any district he shall designate those counsel as assistant district attorneys or assistants to the Attorney General, and give commissions as such in the special business with which they are

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charged, in order that they may be responsible to him and to the Government for the performance of their duties. The committee have been convinced most thoroughly by our investigations that no persons should be charged with the conduct of litigation on behalf of the United States unless he holds the commission under the United States and is responsible to the law and proper authorities. . . . (emphasis added)
(Congressional Globe, 41st Congress, Second Session, Part 4, page 3035 (1870)).

Mr. Jenckes: . . .We have found instances in which not only direct supervision, but direct responsibility to the head of the Department is absolutely necessary for the protection of the Government. (emphasis added)
(Congressional Globe, 41st Congress, Second Session, Part 4, page 3036 (1870)). . . .

Mr. Jenckes: No; but it transfers the Solicitor to the Attorney General's department and avoids the expense of employing outside counsel, which expenses amounted in some instances to $100,000 a year. The additional expense involved by this bill is about thirteen thousand dollars per annum. The annual expenditure is 130,000, so that the increase is about one-tenth of what is sought to be safe. There will of course have to be employed some special assistants for the district attorneys; but I have said they will be appointed by special commissions, receiving a fee to be agreed upon or determined by the Attorney General and by him alone, in which in no case will exceed the compensation properly allowable for the service rendered. (emphasis added)
(Congressional Globe, 41st Congress, Second Session, Part 4, Page 3036 (1870)).

Mr. Jenckes: We propose to make it illegal for the Secretary of the Treasury to do so. If he wishes to engage counsel in any case he must send it to the Attorney General. If the Attorney General cannot

try the case and the emergency requires assistant counsel, he can employ them. It is then done by the head of the law department, and not by the head of the Interior Department or the head of the Treasury Department. He is responsible as the chief law officer of the government. If any error is committed we shall know who is chargeable with it. We shall then have the assurance, if he be the proper person, that the office will be administered economically. These are the principal provisions of the bill. They may not provide a perfect system, but they are certainly adequate to the present law business of the country. (emphasis added)
(Congressional Globe, 41st Congress, 2nd Session, Part 4, Page 3037, (1870)).

28 U.S.C. 510 SHOULD NOT BE READ TO PERMIT DELEGATION OF A FUNCTION COMMITTED BY THE CONSTITUTION ONLY TO THE HEAD OF THE DEPARTMENT

As the discussion of the original statute makes clear, the Congress desired to fix in the Attorney General as the head of the department, the political and fiscal responsibility for the exercise of the powers of appointing Special Assistant U.S. Attorneys. As a matter of both explicit language and statutory intent, the Congress desired to have the Attorney General himself personally appoint Special Assistant United States Attorneys.

The Court of Appeals erred in holding that the provisions of 28 U.S.C. § 510 permit the delegation to an official four levels down from the Attorney General the power to appoint the inferior officer in this case. As a matter of statutory interpretation, given the explicit language of 28 U.S.C. § 543 and the Congressional intent in passing it, the court below erred in failing to limit its construction of Section 510. In *United States v. Giordano*, 416 U.S. 505 (1974) this Court construed the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which provided in 18 U.S.C. 2516(1) that the Attorney General, or any Assistant Attorney General specially designated by the Attorney General," may authorize an application to a federal judge . . . for . . . . an

order authorizing or proving the interception of wire or oral communications by federal investigative agencies." *Giordano* held that notwithstanding the broad provisions of 28 U.S.C. § 510 which authorizes the Attorney General to delegate "any" of his functions, 18 U.S.C. § 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he may designate. Giordano held that the intent of Congress, despite the language of Section 510, was to limit the authorization of wiretapping to the named officials and that the Attorney General could not properly delegate this statutory power to his executive assistant. In reaching its holding, the Court cited extensively from the legislative history of Title III.

As in *Giordano*, the language of the statute and the legislative history of 28 U.S.C. § 543, shows a clear Congressional intent that the power of appointment be exercised by the Attorney General alone. Given the Congressional debates on the original 1870 statute, 28 U.S.C. § 510 should be construed as to avoid the possibility of such excessive delegation as if present in this case. Especially given that the Congress was exercising its power under the Appointments Clause of the Constitution, Section 510 of Title 28 should not be read so broadly as to derogate from the language and purpose of Section 543. Thus, in this case, as in *Giordano*, the statute should be read as requiring action by the Attorney General alone, despite the otherwise broad language of Section 510.

Because of the requirement of Article II, Section 2, Clause 2, that the head of the department appoint inferior officers if so directed by Congress, the delegation by the Attorney General of the power of appointment in this case is unconstitutional. When the Constitution sets forth a specific manner of appointment, the appointing official must act in a manner consistent with the prescribed Constitutional procedure.

The manner of appointment of inferior officers is set forth in the second part of the Appointments Clause. The first part of the Appointments Clause requires that federal officers be appointed by the President and confirmed by the Senate. These officers include consuls, ambassadors, and Supreme Court Justices. It should be noted that they also include at this time United States Attorneys (28

U.S.C. § 541). The Court of Appeals decision in this case, if generally applied to appointments, could be read to authorize the President to delegate the power of appointment of Supreme Court Justices to the Attorney General, who then acting through executive orders, could redelegate that appointment authority to his deputy, who could then delegate it to Director Cinciotta who then could delegate it to the Deputy Director of Office of Personnel Management. Under such reasoning the Deputy Director of the Office of Personnel Management could exercise the President's power of appointment of Supreme Court Justices who would then be subject to Senate confirmation. This ludicrous scenario obviously was never envisioned by the Framers of the Constitution. By setting forth specifically the manner of appointment of both officers, and inferior officers, they intended to require the exercise of such authority in a precise and proper manner.

THE TEXT AND CONSTITUTIONAL HISTORY OF THE APPOINTMENTS CLAUSE PRECLUDES DELEGATION AND SUBDELEGATION OF THE POWER TO APPOINT INFERIOR OFFICERS

Unlike broad grants of legislative power, assuming appropriate legislative guidance (See Tribe, American Constitutional Law, Second Ed. pp.362-369), when the Constitution specifically requires the power of appointment or veto to be exercised by the President or some other member of the executive branch, that power may not properly be "delegated" to some lesser official within the executive branch. When the Appointment Clause requires the appointment of inferior officers by the head of the department, if so vested by the Congress, it is the head of the department and no other person who may Constitutionally exercise that power of appointment. This insures both political accountability and structural clarity in the appointment of persons who are to exercise substantial federal authority.

During the debates on the Appointments Clause, the Framers specifically rejected the argument that inferior officers be appointed by federal authorities below the level of the head of the department. This Court has traced the debate of the Framers in *Buckley v. Valeo* 424 U.S. 1, 129-

131 (1976). In *Morrison v. Olson*, 487 U.S. 654 (1988) this Court noted in relevant part:

> . . . It was at this point, on September 15, that Governor Morris moved to add the excepting Clause to Art. II, § 2, Id. at 627. The one comment made on this motion was by Madison, who felt that the Clause did not go far enough in that it did not allow Congress to vest appointment powers in "Superior Officers below Heads of Department". The first vote on Morris' motion ended in a tie. It was then put forward a second time, with the urging that "some such provision [was] too necessary to be omitted." This time the proposal was adopted Id., at 627-628. 487 U.S. 654, 675.

Thus, the Framers in rejecting Madison's proposal that the excepting Clause did not go far enough by permitting Congress to vest the appointment powers superior officers below heads of departments", clearly showed their intention to require the exercise of the appointment power by the head of the department, and not in officers below the level of the heads of departments. The broad and inappropriate reading of 28 U.S.C. § 510 by the Court of Appeals in this case wrongly allows the appointment power vested by Congress in the Attorney General, to be exercised by a lesser official in violation of the Appointments Clause of the Constitution.

CONCLUSION

The Appointments Clause of the Constitution sets forth the specific manner by which inferior officers of the United States are to be appointed. If the Congress vests the authority to appoint such inferior officers in the head of the department, then the head of the department must exercise the power of appointment. The delegation of the power to appoint inferior officers of the United States to persons below the level of "heads of the department" is forbidden by the Article II, Section 2, Clause 2. Therefore the prosecutor acting in this case was acting without proper

authorization. The Court of Appeals' decision in this case permits the appointment of inferior officers in a manner that is not sanctioned by the Constitution, and in violation of this Court's holdings in *Buckley* and *Morrison*. For these reasons petitioner respectfully requests that the Court grant a writ of certiorari to review the judgment of the Court of Appeals in this case.

DATED: 7 November 1990

Respectfully submitted,

EUGENE G. IREDALE
Attorney for Petitioner
STANLEY PLESINSKI

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. STANLEY PLESINSKI, *Defendant-Appellant.*	No. 89-50206 D.C. No. CR 88-29-AHS OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
May 7, 1990—Pasadena, California

Filed August 10, 1990

Before: Stephen Reinhardt, Edward Leavy and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Leavy

SUMMARY

Criminal Procedure

Affirming the district court's judgment of conviction, the court of appeals held that the U.S. Attorney General is expressly authorized to delegate to lesser officials his power to appoint Special Assistant U.S. Attorneys when the public interest so requires.

Appellant Stanley Plesinski appealed from his conviction following a conditional plea of guilty for conspiracy to possess marijuana with the intent to distribute. Plesinski appealed the district court's denial of his motion to dismiss the indictment or to disqualify Special Assistant U.S. Attorney Sanford Feldman on the grounds that Feldman was unauthorized, due to an ineffective appointment, to represent the government in the criminal proceedings.

[1] Plesinski argued that Feldman was not authorized to participate in the prosecution because he was not personally appointed by the Attorney General to serve as a Special Assistant U.S. Attorney. However, Congress, in 28 U.S.C. § 543(a), vested in the Attorney General, the head of the Department of Justice, the authority to appoint attorneys to assist United States attorneys when the public interest so requires. The court disagreed with Plesinski's argument that section 543 represents an exercise of Congress' power under the appointments clause and therefore the Attorney General alone had to appoint Feldman and that such appointment authority could not constitutionally be delegated to lesser officials. [2] The court found that section 510 also authorizes the delegation of the Attorney General's appointment powers under section 543(a). Congress expressly gave the Attorney General permission to delegate any of his functions.

[3] Assuming the Attorney General may delegate his appointment power, Plesinski argued that the person to whom the Attorney General had delegated his authority, the Deputy Attorney General, had not properly redelegated that authority either to the Director or to the official renewing Feldman's appointment on May 2, 1988. The Deputy Attorney General did not officially redelegate the appointment authority to Director Cinciotta until January 31, 1989. Thus, Plesinski argued that Feldman was not authorized to act as Special Assistant U.S. Attorney General during Plesinski's indictment and prosecution. [4] Contrary to Plesinski's suggestion, however, Feldman's unauthorized appearance on

behalf of the government did not deprive the district court of jurisdiction over the criminal proceedings. Feldman testified that he was not the only government attorney assigned to the case and that he was at all times acting under the direction and supervision of an Assistant U.S. Attorney. Under these circumstances, the court retained its jurisdiction of Plesinski's prosecution despite Feldman's unauthorized participation. [5] Nor did Feldman's unauthorized presence before the grand jury require a dismissal of the indictment. [6] Plesinski did not demonstrate nor did he claim that Feldman's unauthorized presence as an observer substantially influenced the grand jury's decision to indict him. Nor did he claim the grand jury proceedings were fundamentally unfair for that reason. The district court did not err in denying Plesinski's motion to dismiss the indictment. [7] Similarly, the district court properly refused to rehear previously decided motions based on Feldman's unauthorized presence. [8] While the district court denied Plesinski's motion that Feldman be barred from any further participation in the proceedings, the court made it clear that any future participation was conditioned on a cure in the unauthorized appointment. Feldman did not appear on behalf of the government again until Plesinski's sentencing, at which time the defective appointment had been cured.

COUNSEL

Eugene G. Iredale, San Diego, California, for the defendant-appellant.

Sanford Feldman, Special Assistant United States Attorney and Thomas J. Umberg, Assistant United States Attorney, Santa Ana, California, for the plaintiff-appellee.

OPINION

LEAVY, Circuit Judge:

Stanley Plesinski appeals from his conviction following a conditional plea of guilty for conspiracy to possess marijuana with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). Plesinski appeals the district court's denial of his motion to dismiss the indictment or to disqualify Special Assistant U.S. Attorney Sanford Feldman on the grounds Feldman was unauthorized, due to an ineffective appointment, to represent the government in the criminal proceedings. We affirm.

FACTS AND PROCEEDINGS

On May 18, 1988, a four-count indictment was filed against Stanley Plesinski and co-defendant Jacob Vinograd on drug-related charges. The indictment was subsequently superseded on September 9, 1988, and again on January 12, 1989. The second superseding five-count indictment charged Plesinski with conspiring in 1985 to possess marijuana with the intent to distribute, possession of marijuana in 1985, conspiring in 1988 to possess marijuana with the intent to distribute, and two counts of possession of marijuana in 1988.

Sanford Feldman, a Deputy Attorney General for the State of California, participated in the indictment, prosecution, and sentencing of Plesinski. Feldman was appointed as a Special Assistant U.S. Attorney by Brian Meyers, Deputy Director of the Office of Attorney Personnel Management for the Department of Justice ("Deputy Director"), on September 19, 1986. Feldman took the oath of office on October 26, 1986. On April 1, 1987, Meyers extended Feldman's appointment, which had expired on March 31, 1987, through April 30, 1988. After a two-day lapse, the appointment was extended again on May 2, 1988, by Deputy Director Mark Wilkoff to April 30, 1989. Feldman did not take a second oath following the May 1988 extension of his appointment.

The Deputy Directors' authority to appoint Feldman stemmed from a 1981 Attorney General Order which delegated to the Associate Attorney General the Attorney General's power and authority under 28 U.S.C. § 543 to appoint special "attorneys to assist United States Attorneys."[1] *See* 28 C.F.R. § 0.19(a)(1) (1981). The Associate Attorney General in turn was authorized to "redelegate" that authority "to the official in the Office of the Deputy Attorney General responsible for attorney personnel management." *Id.* § 0.19(b). By written orders, the acting Associate Attorney Generals thereafter redelegated the appointment authority to the appropriate official, the Director of the Office of Attorney Personnel Management ("Director"), Linda Cinciotta. Pursuant to another Attorney General Order authorizing the Director to convey that authority to her Deputy Director, *see* 28 C.F.R. § 0.15(e)(2) (1985), Cinciotta issued a memorandum redelegating her section 543 appointment authority to Deputy Director Meyers on August 10, 1984, and to Deputy Director Wilkoff on July 30, 1987.

On February 24, 1988, the Attorney General published an order which transferred the authority to appoint special assistant U.S. attorneys from the Associate Attorney General back to the Deputy Attorney General. *See* 28 C.F.R. § 0.15(b)(1)(v) (1988). While the regulations permitted the Deputy Attorney General to "redelegate" that authority to Director Cinciotta, *id.* §§ 0.15(c) & (e), the Deputy Attorney General did not do so until January 31, 1989. The second extension of Feldman's appointment by Deputy Director Wilkoff in May 1988 occurred after the February 1988 transfer of appointment power to the Deputy Attorney General but before the January 1989 redelegation to the Director by the Deputy Attorney General.

[1]The 1981 Order effectively transferred the appointment authority from the Deputy Attorney General to the Associate Attorney General.

At the request of the U.S. Attorneys Office for the Central District of California, by letter dated November 23, 1988, Deputy Director Wilkoff issued a second appointment for Feldman as a Special Assistant U.S. Attorney to expire April 30, 1989. Feldman took the oath of office again on November 23, 1988.

On December 20, 1988, Plesinski moved to dismiss the indictment or, in the alternative, to disqualify Feldman and to relitigate the motions that had previously been decided on the grounds Feldman was not properly authorized to act as a Special Assistant U.S. Attorney. Plesinski argued the second extension of Feldman's appointment in May 1988 and his reappointment in November 1988 were ineffective because the Deputy Attorney General had not as yet redelegated his appointment power to either the Director or the Deputy Director.

On February 6, 1989, the court orally denied Plesinski's motion to dismiss or disqualify Feldman. While the district judge found that Feldman was not properly authorized to appear before the court as of May 2, 1988, she denied the motion to dismiss the indictment on the grounds the unauthorized participation was "harmless." With respect to disqualification, the court found that Feldman acted at all times under the supervision of an assistant U.S. attorney, and on that basis would not "undo that which [had] already been done with regard to the [previously decided] motions." The court also denied Plesinski's request that Feldman not participate further in the proceedings, but stated that "it must be understood that if Mr. Feldman does nothing, he would effectively disqualify himself for future proceedings." The court noted that the supervising assistant U.S. attorney could "cure" the defective appointment or "tak[e] steps that would make a difference that would let him participate in future proceedings."

On February 8, 1989, Plesinski entered a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2)[2] to the 1985 conspiracy count, thereby preserving his right to appeal the denial of the motion to dismiss or disqualify Feldman. At the government's request, the remaining four counts of the second superseding indictment were dismissed. On February 9, 1989, Feldman was properly appointed as a Special Assistant U.S. Attorney by Director Cinciotta. On April 3, 1989, Feldman appeared on behalf of the government at sentencing, wherein Plesinski was sentenced to nine years imprisonment pursuant to 18 U.S.C. § 4205(b)(2). This timely appeal followed.

STANDARD OF REVIEW

We review de novo the district court's refusal to dismiss the indictment for prosecutorial misconduct. *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989).[3] The district court's refusal to disqualify the prosecutor is reviewed for abuse of discretion. *See United States v. Bolton*, Nos. 88-1946 & 89-5057, slip op. at 5 (10th Cir. May 30, 1990).

DISCUSSION

I. COLLATERAL ATTACK OF APPOINTMENT

At the onset, the government argues that Plesinski may not

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[2]Rule 11(a)(2) provides:

With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

[3]We note, however, that this court has applied an abuse of discretion standard on at least two occasions. *See United States v. Gonzalez*, 800 F.2d 895, 899 (9th Cir. 1986); *United States v. Noti*, 731 F.2d 610, 613 (9th Cir. 1984).

collaterally attack the validity of Feldman's appointment in this criminal proceeding, but rather must pursue it in a separate proceeding for that purpose. *See United States v. Mitchell*, 136 F. 896 (9th Cir. 1905). We disagree.

In *Mitchell*, the defendant filed "pleas of abatement"[4] challenging the indictment on the grounds the grand jury was not "regularly" impaneled and the special prosecutor bringing the indictment was improperly appointed. In considering the pleas pretrial, we held, *inter alia*, that a court-appointed special prosecutor's "right to the office cannot be collaterally attacked." *Id.* at 906.

> [I]f the office has been lawfully established and a person exercises the functions thereof by color of right, but whose election or appointment thereto is illegal, his official acts therein cannot be successfully attacked in collateral proceedings, but in all such proceedings will be valid and binding until the officer is ousted by the judgment of a court in a direct proceeding to try his title to the office.

Id. (quotation omitted).

The holding of *Mitchell* is inapplicable in this case because Plesinski is not "collaterally attacking" Feldman's appointment. Unlike the defendant in *Mitchell* who filed a "plea of abatement" action to test the prosecutor's authority pretrial, Plesinski is challenging Feldman's authority in a direct appeal following his conviction. Both the Supreme Court and this court have permitted similar challenges to the authority of the specially-appointed prosecutor on appeal from a crimi-

[4]A "plea of abatement sets forth facts extrinsic to [the] merits which affect only [the] manner in which [an] action is framed or [the] circumstances under which it is sought to be prosecuted, and does not destroy the right of action but merely suspends or postpones its prosecution." *Black's Law Dictionary* 1038 (5th ed. 1979).

nal conviction. *See Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787 (1987)(reversal of contempt conviction on the grounds the court improperly appointed the beneficiary of the contempt order to prosecute the defendant for an alleged violation of that order); *United States v. Hawthorne*, 626 F.2d 87, 89-90 (9th Cir. 1980)(per curiam). Accordingly, Plesinski may challenge Feldman's authority to act as a special assistant U.S. attorney in this appeal.

II. THE APPOINTMENT OF FELDMAN

Plesinski argues that the district court erred in refusing to dismiss the indictment or disqualify Special Assistant Feldman. Plesinski raises three arguments as to why Feldman's appointment was ineffective: (A) the appointments clause required that the Attorney General personally appoint Feldman; (B) assuming the Attorney General may delegate his appointment powers, the chain of delegation was flawed; and (C) Feldman acted without authority because he did not renew the oath of office after the second extension of his appointment on May 2, 1988.

A. Appointments Clause

[1] Plesinski argues that Feldman was not authorized to participate in the prosecution because he was not personally appointed by the Attorney General to serve as a Special Assistant U.S. Attorney. Plesinski maintains that the appointments clause of the United States Constitution prohibits the Attorney General from delegating his power to appoint special assistant U.S. attorneys.

The appointments clause provides in pertinent part:

> [The President] shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers

> of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*

U.S. Const. art. II, § 2, cl. 2 (emphasis added). Congress thereafter vested in the Attorney General, the head of the Department of Justice, the authority to "appoint attorneys to assist United States attorneys when the public interest so requires." *See* 28 U.S.C. § 543(a). Plesinski argues that section 543 represents an exercise of Congress' power under the appointments clause and therefore the Attorney General "alone" had to appoint Feldman and that such appointment authority could not constitutionally be delegated to lesser officials. We disagree.

Congress has passed legislation which permits the Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." *See* 28 U.S.C. § 510. Several courts have held that the Attorney General may, pursuant to section 510, redelegate his authority to appoint special assistants to the Attorney General under 28 U.S.C. § 515(a)[5] to

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[5]Section 515(a) provides:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

Sections 543 and 515 are considered independent statutory authorizations. Section 543 authorizes the appointment of attorneys to assist the U.S. Attorney, while section 515 authorizes the appointment of attorneys to assist the Attorney General. *United States v. Hawthorne*, 626 F.2d 87, 89 (9th Cir. 1980)(per curiam).

subordinates in the Department of Justice. *See United States v. Cravero*, 545 F.2d 406, 410 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *United States v. Agrusa*, 520 F.2d 370, 372 (8th Cir. 1975). We have also noted in dictum that the argument "the Attorney General is without authority to delegate his power to [appoint] government attorneys" under section 515(a) is "without merit." *See United States v. Prueitt*, 540 F.2d 995, 1000 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

[2] We find that section 510 also authorizes the delegation of the Attorney General's appointment powers under section 543(a). Congress expressly gave the Attorney General permission to delegate "any" of his functions. There is no indication Congress meant to exclude the Attorney General's section 543 appointment power from this otherwise unqualified statutory authorization of delegation. Having granted the Attorney General the authority to appoint government attorneys, it was within Congress' power to permit a delegation of that authority, and we find nothing in the text or history of the Constitution which suggests otherwise. Thus, we reject Plesinski's argument that the Attorney General's appointment power under section 543 may not constitutionally be delegated to lesser officials.

B. Chain of Delegation

[3] Assuming the Attorney General may delegate his appointment power, Plesinski argues that the person to whom the Attorney General had delegated his authority, the Deputy Attorney General, had not properly redelegated that authority either to the Director or to the official renewing Feldman's appointment on May 2, 1988. The Deputy Attorney General did not officially redelegate the appointment authority to Director Cinciotta until January 31, 1989. Thus, Feldman was not authorized to act as Special Assistant U.S. Attorney during Plesinski's indictment and prosecution.

The government acknowledges that "[i]t is undisputed in the instant case that the Deputy Attorney General did not execute a written delegation of the power to appoint Special Assistant United States Attorneys to the Office of the Attorney Personnel Management during the period February 16, 1988 to January 30, 1989." However, it argues the absence of such a writing during that period does not invalidate Feldman's appointment. The government relies on *United States v. Balistrieri*, 779 F.2d 1191, 1209 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986), in which the court held that "a letter of authorization is not essential to the validity of an appointment under § 515(a)" if there is sufficient evidence the special prosecutor "was in fact authorized to appear" in the proceedings.

The government's argument misses the mark. The issue in this case is not whether or when a particular appointment was made as in *Balistrieri*, but whether the appointing offical had the authority to make the appointment. It is undisputed that the Deputy Attorney General had not redelegated his appointment authority to the officer who appointed Feldman on May 2, 1988. Thus, no evidence could be presented to the effect that Feldman was "in fact authorized to appear" in the proceedings against Plesinski.

[4] Contrary to Plesinski's suggestion, however, Feldman's unauthorized appearance on behalf of the government did not deprive the district court of jurisdiction over the criminal proceedings. Granted, 28 U.S.C. §§ 516 and 547 reserve litigation in which the United States is a party either to officers of the Department of Justice or to U.S. Attorneys.[6] However,

[6]Section 516 provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."

Section 547(1) provides: "Except as otherwise provided by law, each United States Attorney, within his district, shall . . . prosecute for all offenses against the United States."

while he appeared in court alone on several occasions, Feldman testified he was not the only government attorney assigned to the case and that he was at all times acting under the direction and supervision of an Assistant U.S. Attorney. Under these circumstances, the court retained its jurisdiction over Plesinski's prosecution despite Feldman's unauthorized participation. *See United States v. Providence Journal Co.*, 108 S. Ct. 1502, 1511 (1988)(Court lacked jurisdiction unless "a proper representative of the Government" participated in the action); *Home News Publishing Co. v. United States*, 329 F.2d 191, 193 (5th Cir. 1964)(court retained jurisdiction where Assistant U.S. Attorney "stands responsible for conduct of the trial"); *United States v. Denton*, 307 F.2d 336, 338-39 (6th Cir.), *cert. denied*, 371 U.S. 923 (1962).

[5] Nor did Feldman's unauthorized presence before the grand jury require a dismissal of the indictment. In *United States v. Mechanik*, 475 U.S. 66, 71-72 (1986), the Supreme Court adopted the harmless error standard of Fed. R. Crim. P. 52(a)[7] for violations of Fed. R. Crim. P. 6(d)[8]. *See also Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2373 (1988)("a District Court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants"). Where a dismissal is sought for nonconstitutional errors, "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 2374 (quoting *Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring)).

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[7]Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[8]Rule 6(d) provides that only "[a]ttorneys for the government, the witness under examination, interpreters when needed and . . . a stenographer or operator of a recording device may be present while the grand jury is in session . . . ." Rule 54(c) states that " 'Attorney for the government' means the Attorney General, a United States Attorney, [or] an authorized assistant of a United States Attorney . . . ."

[6] Plesinski has not demonstrated nor does he claim that Feldman's unauthorized presence as an observer[9] "substantially influenced" the grand jury's decision to indict him. Nor does he claim the grand jury proceedings were fundamentally unfair for that reason.[10] Under these circumstances, the district court did not err in denying Plesinski's motion to dismiss the indictment.

[7] Similarly, the district court properly refused to rehear previously decided motions based on Feldman's unauthorized participation.[11] Again, Plesinski does not claim that he was prejudiced by Feldman's participation in the pretrial motions. He merely claims that he is "entitled to have a duly authorized and properly qualified representative of the government study, analyze, and present the government's position" with respect to these motions. In fact, while Feldman may have prepared and argued the government's responses to several of Plesinski's pretrial motions, he testified that his actions were "subject to [the supervising Assistant U.S. Attorney's] approval" and that he did not make the

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[9]The government represented that "Feldman did not say or do anything nor did anyone make any reference to him in front of the grand jury." Plesinski did not dispute this and "accept[ed the government's] representation as though under oath."

[10]A presumption of prejudice arises where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair." *Bank of Nova Scotia*, 108 S. Ct. at 2375; *see United States v. Howard*, 867 F.2d 548, 551-52 (9th Cir. 1989). Certainly, Feldman's silent observation of the grand jury proceeding does not rise to this level.

[11]The motions which Plesinski sought to relitigate were argued on January 23, 1988. Plesinski did not object to Feldman's participation in the proceedings until December 20, 1988, eleven months later. Several courts have held that a defendant waives strict compliance with section 515 where he fails to object to the unauthorized attorney's participation in a timely manner. *See Wall v. United States*, 384 F.2d 758, 763 (10th Cir. 1967); *Home News Publishing Co. v. United States*, 329 F.2d 191, 193 (5th Cir. 1964); *United States v. Denton*, 307 F.2d 336, 338-39 (6th Cir.), *cert. denied*, 371 U.S. 923 (1962).

final decisions in connection with the prosecution. Under these circumstances, Plesinski has already received the remedy which he requests today.

[8] And finally, while the district court denied Plesinski's motion that Feldman be barred from any further participation in the proceedings, the court made it clear that any future participation was conditioned on a "cure" in the unauthorized appointment. Feldman did not appear on behalf of the government again until Plesinski's sentencing, at which time the defective appointment had been cured. It was not an abuse of discretion for the district court to deny Plesinski's motion upon the condition of a "cure."

C. Oath Requirement

Plesinski argues that the failure to readminister an oath on May 2, 1988, after the lapse of Feldman's appointment on April 30, 1988, vitiated any valid authorization he may have had to conduct proceedings as a Special Assistant U.S. Attorney. Title 28, United States Code, § 544 provides that each "attorney appointed under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties." Plesinski relies on *United States v. Pignatiello,* 582 F. Supp. 251 (D. Colo. 1984), wherein the court dismissed an indictment based on the special prosecutor's failure to take the oath prior to appearing before the grand jury.

Pignatiello is inapplicable in this case. Unlike the special prosecutor in *Pignatiello,* Feldman had taken the oath of office upon his original valid appointment on October 26, 1986. Admittedly, he did not renew the oath of office following his unauthorized reappointment after a two-day lapse in May 1988. However, Feldman, who was not aware of any defect in the appointment until November 1988, continued to act as a special prosecutor, presumably in reliance upon the original oath. When it was discovered that the May 1988 appointment was defective, Feldman immediately renewed

the oath of office on November 23, 1988. Under these circumstances, we find that Feldman sufficiently complied with the oath requirement of section 544.

AFFIRMED.

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No. 90-808

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In the Supreme Court of the United States

OCTOBER TERM, 1990

STANLEY PLESINSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction must be reversed because an attorney who assisted in the prosecution was appointed by a subordinate official of the Department of Justice, pursuant to a delegation by the Attorney General of his appointment authority, rather than by the Attorney General personally.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 8659-8674) is reported at 912 F.2d 1033.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. The petition for a writ of certiorari was filed on November 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the Central District of California to the charge of conspiring to

possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to nine years' imprisonment. The court of appeals affirmed.

1. The evidence ~~at trial,~~ the sufficiency of which is not in dispute here, showed that from at least 1985 until 1988, petitioner conspired to possess several thousand pounds of Mexican marijuana with the intent to distribute it. Petitioner's co-conspirator, Ivan Summers, negotiated with the suppliers and arranged for the marijuana to be delivered; petitioner accepted delivery of the marijuana and distributed it to others. In 1988, a confidential informant negotiated with petitioner to purchase 1000 kilograms of marijuana. In May 1988, petitioner accepted delivery of approximately 1000 kilograms of marijuana and made a $35,000 down payment on the purchase price. Gov't C.A. Br. 4-5.

2. The issue in this case involves the manner in which Sanford Feldman, a Deputy Attorney General for the State of California, was appointed to assist in the prosecution of petitioner. The relevant facts are stated in the court of appeals' opinion. Pet. App. 8662-8665. On September 19, 1986, Feldman was appointed as a Special Assistant U.S. Attorney by Brian Meyers, Deputy Director of the Office of Attorney Personnel Management in the Department of Justice. Feldman's appointment was subsequently extended by Meyers through April 30, 1988. On May 2, 1988, Meyers' successor as Deputy Director, Mark Wilkoff, extended Feldman's appointment through April 30, 1989. *Id.* at 8662-8664.

The authority for Feldman's appointment as a Special Assistant U.S. Attorney had its source in 28 U.S.C. 543, which provides: "The Attorney General may appoint attorneys to assist United States at-

torneys when the public interest so requires." Under 28 U.S.C. 510, the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." In 1981, pursuant to 28 U.S.C. 510, the Attorney General delegated his authority to appoint attorneys under 28 U.S.C. 543 to the Associate Attorney General, who in turn was authorized to "redelegate" that authority to "the official in the Office of the Deputy Attorney General responsible for attorney personnel management." 28 C.F.R. 0.19 (1981). In accordance with the latter provision, the Associate Attorney General subdelegated his appointment authority to the Director of the Office of Attorney Personnel Management. Thereafter, as authorized by another order of the Attorney General, 28 C.F.R. 0.15(e)(2) (1988), the Director of that Office further delegated the appointment authority to the Deputy Director.

On February 24, 1988, the Attorney General published an order transferring the appointment authority under Section 543 from the Associate Attorney General to the Deputy Attorney General, who had possessed that delegated authority prior to 1981. 28 C.F.R. 0.15(b)(1)(v) (1988). Although the regulations permitted the Deputy Attorney General to "redelegate" that authority to the Director of the Office of Attorney Personnel Management, 28 C.F.R. 0.15(c) and (e), the Deputy Attorney General did not do so until January 31, 1989. The second extension of Feldman's appointment, by Deputy Director Wilkoff in May 1988, occurred after the February 1988 transfer of appointment power to the Deputy Attorney General but before the January 1989 redelegation to the Director. Pet. App. 8663.

3. On May 18, 1988, a four-count indictment was filed against petitioner. Superseding indictments were filed on September 9, 1988, and January 12, 1989. Petitioner moved to dismiss the indictment or in the alternative to disqualify Feldman, on the ground that Feldman was not authorized to act as a Special Assistant U.S. Attorney after April 30, 1988, because he did not take a new oath of office when he was reappointed on May 2, 1988. E.R. 31-33.[1] In a supplemental memorandum, petitioner argued that 28 U.S.C. 543 does not permit the Attorney General to delegate his authority to appoint attorneys to assist U.S. Attorneys, and that the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) would not in any event permit such a delegation. E.R. 36-43.

On February 6, 1989, the district court orally denied petitioner's motion. Pet. App. 8664. Although the court concluded that Feldman was not properly authorized to appear before the court after April 30, 1988, it declined to dismiss the indictment on that ground because it found that Feldman's unauthorized participation in the indictment process was "harmless." *Ibid.* In response to petitioner's alternative request to disqualify Feldman, the court found that Feldman acted at all times under the supervision of an Assistant U.S. Attorney, and on that basis the court declined to "undo that which [had] already been done with regard to the [previously decided] motions." *Ibid.* The court similarly denied petitioner's request to order that Feldman not participate in the proceedings in the future, although it

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[1] "E.R." refers to the excerpt of record filed in the court of appeals.

indicated that he would not be qualified to do so if the defective appointment was not cured. *Ibid.*

Following the district court's denial of his motion to dismiss the indictment or disqualify Feldman, petitioner entered a conditional plea of guilty to one count of the indictment on February 8, 1989, preserving his right to appeal the denial of the motion. At the government's request, the remaining counts were dismissed. On February 9, 1989, following the Deputy Attorney General's order delegating his appointment authority under 28 U.S.C. 543 to the Director of the Office of Attorney Personnel Management, Feldman was reappointed as a Special Assistant U.S. Attorney by the Director. Feldman subsequently appeared on behalf of the government at petitioner's sentencing. Pet. App. 8665.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 8659-8674. As a threshold matter, it ruled that petitioner could challenge Feldman's authority to assist in the prosecution as a ground for setting aside his conviction on direct appeal. See Pet. App. 8665-8667. On the merits, the court rejected petitioner's contention that the Appointments Clause requires that the Attorney General personally exercise the authority conferred by 28 U.S.C. 543 to appoint attorneys to assist U.S. Attorneys. Pet. App. 8667-8669. The court held that 28 U.S.C. 510, which authorizes the Attorney General to delegate "any" of his functions, permits the Attorney General to delegate his appointment power under Section 543, since "[t]here is no indication Congress meant to exclude the Attorney General's section 543 appointment power from his otherwise unqualified statutory statutory authorization of delegation." Pet. App. 8668-8669. The court found this conclusion to be supported by decisions upholding the Attorney General's

delegation of his parallel authority under 28 U.S.C. 515(a) to appoint special assistants to the Attorney General. Pet. App. 8669.

The court of appeals also addressed several other arguments raised by petitioner. First, it agreed with petitioner that Feldman was not authorized to act as a Special Assistant U.S. Attorney after his appointment lapsed on April 30, 1988, since there was no delegation of appointment authority from the Deputy Attorney General to the Director of Attorney Personnel Management between then and January 31, 1989. Pet. App. 8669-8670. However, the court held that Feldman's unauthorized appearance on behalf of the government during that time did not deprive the district court of jurisdiction and require reversal of petitioner's conviction, because Feldman testified that he "was at all times acting under the direction and supervision of an Assistant U.S. Attorney." *Id.* at 8670-8671. Second, the court held that Feldman's unauthorized presence before the grand jury did not require dismissal of the indictment because there was no showing of prejudice. Pet. App. 8671-8672 (citing *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256-257 (1988)). Third, the court held that Feldman's participation did not require the district court to reconsider motions it had decided previously. The court of appeals noted that although Feldman may have prepared and argued the government's response to several of petitioner's pretrial motions, his actions were subject to the supervising Assistant U.S. Attorney's approval and he did not make the final decisions in connection with the prosecution. Pet. App. 8672-8673.

ARGUMENT

The court of appeals properly declined to set aside petitioner's conviction on the ground that Sanford Feldman, who assisted in the prosecution, was not personally appointed by the Attorney General under 28 U.S.C. 543. The decision below does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Even if petitioner's objection to the manner in which Feldman was appointed had merit, it would not furnish a basis for setting aside his conviction—at least in the absence of some showing of prejudice. By law, it is the United States Attorney who is vested with the power to prosecute crimes. Specifically, 28 U.S.C. 547(1) provides that "[e]xcept as otherwise provided by law, each United States attorney, within his district, shall * * * prosecute for all offenses against the United States." Consistent with that directive, the indictment in this case was returned in the name of the United States Attorney, and government motions were filed in his name. See E.R. 6, 14, 22, 44, 50, 97, 157. Petitioner does not contend that there was a statutory or constitutional defect in the manner in which the U.S. Attorney was appointed, and 28 U.S.C. 541(a) in fact provides, consistent with the Appointments Clause, that the President shall appoint each U.S. Attorney with the advice and consent of the Senate.

Under 28 U.S.C. 543, the Attorney Geenral is authorized to "appoint attorneys to assist United States attorneys when the public interest so requires." Feldman thus was appointed in this case only to assist the U.S. Attorney in carrying out the latter's responsibilities. Where, as here, the prosecution was under the control of a validly appointed Officer of the

United States, a defendant should not be entitled to challenge his conviction by challenging the government's method of selecting the person upon whom that Officer chose to rely for assistance in the prosecution. As the court below recognized, Pet. App. 8671, this case therefore differs from *United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988), where the Court held that it lacked jurisdiction because the case had not been brought to it by a "proper representative of the Government." *Id.* at 708.[2]

The court of appeals concluded that Feldman was at all times under the direction and supervision of an Assistant U.S. Attorney, whose participation in the prosecution petitioner has never challenged. Pet. App. 8670-8671, 8672-8673. The court of appeals relied on Feldman's subordinate status in concluding

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[2] As the Court noted in *Providence Journal*, the Solicitor General is vested by statute with the authority to conduct cases in this Court on behalf of the government. 28 U.S.C. 518. Nothing in *Providence Journal* suggests, however, that an opposing party would have a basis to move to dismiss a certiorari petition validly filed in the name of the Solicitor General on the ground that it had been drafted by an "Assistant to the Solicitor General" who had not been properly appointed to his position. In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), although the Court set aside a contempt conviction because the attorney for an interested private party had been appointed by the court "to be in control of the prosecution," it emphasized that private counsel's familiarity with the case could "be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action." 481 U.S. at 806 n.17; see *Person* v. *Miller*, 854 F.2d 656, 662-664 (4th Cir. 1988) (sustaining contempt conviction where counsel for interested private party participated in proceeding under control of U.S. Attorney), cert. denied, 489 U.S. 1011 (1989).

that although he was not validly appointed under Justice Department regulations between April 30, 1988, and February 9, 1989, petitioner's conviction should not be set aside on account of Feldman's unauthorized participation, because the Assistant U.S. Attorney was a proper representative of the government who was responsible for the conduct of the trial. See *id.* at 8670-8671 (citing *Home News Publishing Co.* v. *United States*, 329 F.2d 191, 193 (5th Cir. 1964), and *United States* v. *Denton*, 307 F.2d 336, 338-339 (6th Cir.), cert. denied, 371 U.S. 923 (1962)). See also *Wall* v. *United States*, 384 F.2d 758, 763 (10th Cir. 1967). For similar reasons, the court of appeals correctly concluded that what it found to be Feldman's unauthorized presence before the grand jury, in violation of Fed. R. Crim. P. 6(d), did not require dismissal of the indictment, since petitioner did not show that Feldman's presence "substantially influence[d]" the grand jury's decision to indict him or that the grand jury proceedings were fundamentally unfair as a result. Pet. App. 8671-8672 (quoting *United States* v. *Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)).[3] See also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988) (district court may not dismiss indictment for errors in grand jury proceedings unless errors prejudiced defendant). Petitioner does not challenge these determinations by the district court that he was not prejudiced by Feldman's participation. The certiorari petition should be denied on the foregoing grounds alone.

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[3] The court of appeals and petitioner accepted the government's representation in this case that "Feldman did not say or do anything nor did anyone make reference to him in front of the grand jury." Pet. App. 8672 n.9.

2. Petitioner's contention (Pet. 8-13) that the Attorney General is barred by statute from delegating his appointment authority under 28 U.S.C. 543 is without merit. Under 28 U.S.C. 510, the Attorney General may "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." There is nothing in that all-inclusive language to suggest that the function of the Attorney General under 28 U.S.C. 543 of appointing attorneys to assist U.S. Attorneys is excluded from Section 510's delegation authorization. Nor has petitioner pointed to any such suggestion in the legislative history of Section 510. Congress enacted Section 510 in the same subsection of the same public law in which it enacted Section 543. See Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(c), 80 Stat. 612, 618. If Congress had intended to exempt the latter Section from the scope of the former, it presumably would have included a provision to that effect in the text of Section 510 itself. Petitioner's notion that Congress would have wanted to exclude the appointment authority from the delegation it permitted by Section 510 is further undermined by the fact that in Section 1 of the same public law (80 Stat. 379), Congress also enacted 5 U.S.C. 302(b)(1), which provides that the head of an Executive agency may "delegate to subordinate officials the authority vested in him by law to take final action on matters pertaining to the employment * * * of personnel under his agency."

Petitioner nevertheless contends (Pet. 9-11, 12) that Section 543 requires the Attorney General personally to exercise the authority to appoint attorneys to assist U.S. Attorneys, thereby precluding the Attorney General from relying on his delegation au-

thority under Section 510. Nothing in the text of Section 543 suggests that it bars the Attorney General from exercising the broad power of delegation conferred on him by Section 510, and petitioner cites nothing in its legislative history to that effect. Instead, petitioner relies (Pet. 9-11) on the legislative history of the 1870 Act of Congress establishing the Department of Justice, which contained a similar provision. Act of June 22, 1870, ch. 150, § 17, 16 Stat. 164-165.

The legislative history of an 1870 statute is of little value in determining whether 28 U.S.C. 510, which was enacted in 1966, applies to the appointment authority in 28 U.S.C. 543, which was also enacted in 1966. In any event, however, the legislative history on which petitioner relies does not address the delegation issue. The subjects under discussion in the passages petitioner quotes were the need to limit expenditures for and ensure control over lawyers hired from outside the government, and whether the Attorney General, rather than the Heads of other Departments, such as the Interior Department or the Treasury Department, should be responsible for hiring lawyers to represent those other Departments. Representative Jenckes, on whose remarks petitioner relies, was making the point that vesting the authority to appoint such attorneys in the Attorney General was consistent with the Attorney General's responsibility, as the "chief law officer of the government," to represent the United States in all legal matters. See Pet. 10-11. Nothing in Representative Jenckes's defense of the arrangement that was ultimately enacted into law is inconsistent with the proposition that the Attorney General might delegate his appointment authority to a subordinate official in the Department of Justice, subject to his supervision and control as the chief law officer.

Finally, petitioner's reliance (Pet. 11-12) on *United States* v. *Giordano*, 416 U.S. 505 (1974), is misplaced. There the Court concluded that specific statutory language restricting the authority to apply for a wiretap authorization to "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General," 18 U.S.C. 2516(1), was intended to preclude delegation of the wiretap-application authority to any Justice Department official other than those named. For that reason, the Court concluded that the Attorney General could not rely on his general delegation authority under Section 510 to delegate the wiretap-application authority to other Justice Department officials. 416 U.S. at 513-514. Section 543, by contrast, does not address the subject of delegation and therefore does not displace the general delegation authorization in Section 510. Significantly, the Court in *Giordano* found "unexceptionable" the proposition that the more usual phrasing of a grant of authority to "the Attorney General," as in Section 543, is not to be construed as precluding the Attorney General from delegating that authority pursuant to Section 510. 416 U.S. at 513-514. *Giordano* therefore lends no support to petitioner's argument that the Attorney General is barred as a statutory matter from delegating his authority to appoint attorneys to assist U.S. Attorneys.

Despite thousands of hiring decisions made under Section 543 by delegatees of the Attorney General over the years,[4] petitioner has cited no case, and we

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[4] We have been informed by the Executive Office for United States Attorneys in the Department of Justice that there are approximately 2100 appointments currently in effect under 28 U.S.C. 543 alone.

have found none, suggesting that the Attorney General is foreclosed from delegating his authority under 28 U.S.C. 543 to appoint attorneys to assist U.S. Attorneys. As the court below recognized, other courts have rejected the essentially identical argument that Section 510 does not authorize the Attorney General to delegate his parallel power under 28 U.S.C. 515(a) to appoint special assistants to the Attorney General. See Pet. App. 8668-8669 (citing *United States* v. *Cravero*, 545 F.2d 406, 410 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977), and *United States* v. *Agrusa*, 520 F.2d 370, 372 (8th Cir. 1975)).

3. Petitioner argues (Pet. 7, 13-15) that the Appointments Clause of the Constitution bars the Attorney General from delegating his power under 28 U.S.C. 543 to appoint attorneys to assist U.S. Attorneys. The first portion of that Clause provides that the President shall nominate and, with the advice and consent of the Senate, shall appoint all "Officers of the United States" whose appointments are not otherwise provided for in the Constitution itself and which shall be established by law. The second portion of the Clause provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Petitioner contends (Pet. 7) that Feldman was an "Officer of the United States," relying on the holding in *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976), that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in a manner prescribed by § 2, Cl. 2, of

[Article II]." In petitioner's view, Feldman was an "inferior Officer" within the meaning of the Appointments Clause, and under the second portion of the Clause had to be appointed by the "Head of [the] Department" (the Attorney General) personally, not by a subordinate official pursuant to a delegation by the Attorney General of his appointment authority. Petitioner's theory apparently would require that all of the several thousand attorneys in the Department of Justice, or at least those who appear in court on behalf of the government, must be appointed by the Attorney General personally. The Constitution does not place such rigid constraints on the Attorney General.

There is a significant difference between this case and *Buckley* v. *Valeo*. In *Buckley*, Congress had vested various powers, including the conduct of litigation, directly in officials who were not themselves appointed in conformity with the Appointments Clause and thus were not proper "Officers of the United States." Here, the "significant authority pursuant to the laws of the United States" (*Buckley*, 424 U.S. at 126) that is at issue—the power to prosecute offenses against the United States—is vested by Act of Congress directly in the U.S. Attorney, who is an "Officer of the United States" and who is appointed in conformity with the Appointments Clause. See 28 U.S.C. 541(a). Moreover, the U.S. Attorneys (as well as Assistant U.S. Attorneys and attorneys appointed under 28 U.S.C. 543) are expressly subject by law to the direction of the Attorney General, see 28 U.S.C. 516, 519, who is a superior Officer of the United States subject to the President's immediate control. Thus, unlike in *Buckley*, there can be no contention here that Con-

gress has sought to remove the power to conduct litigation involving the government from the control of accountable officials of the Executive Branch—and, more specifically, from Officers of the United States. The question here, rather, concerns the status of an attorney within a Department of the Executive Branch who participates in litigation under the control of the Attorney General and the U.S. Attorney.

We do not question that the assignment of responsibilities within an Executive Department must be consistent with the principles of *Buckley*. It does not follow from this premise, however, that *all* attorneys who participate in any way in the conduct of litigation must be Officers of the United States in the constitutional sense.

Attorneys appointed under Section 543 merely assist the U.S. Attorney, who remains vested with his full power and responsibility under 28 U.S.C. 547(1) for the prosecution of all criminal offenses against the United States within his district. Accordingly, nothing in the nature of an appointment under Section 543 necessarily requires that an attorney receiving such an appointment will assume the sort of control over the investigation or prosecution that would satisfy the *Buckley* standard of "exercising significant authority pursuant to the laws of the United States." [5] In this case, the court of appeals accepted the government's evidence and representations that Feldman played no active role whatever in the grand jury proceedings, "did not make the final decisions in connection with the prosecution," and "was at all times acting under the direction and supervision of an Assistant U.S. Attorney," whose participation in the

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[5] Cf. 13 Op. Att'y Gen. 516, 521 (1871); *United States* v. *Smith*, 124 U.S. 525, 531-532 (1988).

grand jury investigation, indictment, and prosecution has never been challenged by petitioner. Pet. App. 8670-8671, 8672-8673 & n.9.[6]

Even if Feldman was an "inferior Officer," that would not render his participation unlawful unless the Appointments Clause required his appointment to be made personally by the Attorney General, as petitioner maintains. Petitioner, however, has not cited any authority holding that the Appointments Clause bars the Attorney General from delegating the authority vested in him to appoint inferior Officers within the Department of Justice. Certainly nothing in the text of the Clause forecloses that result. The Clause merely provides that "the Congress may by Law vest the Appointment of * * * inferior Officers * * * in the Heads of Departments." Section 543 is consistent with that requirement, because it vests the appointment of attorneys to assist U.S. Attorneys in the Attorney General. The Appointments Clause does not address the question whether the Attorney General may delegate his appointment power to his subordinates.

Nonetheless, the principle of delegation of vested powers may fairly be said to be inherent in Article II. That Article states that "The executive Power shall be vested in the President of the United States of America," Art. II, § 1, Cl. 1, but it has long been recognized that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926) (quoted in *Buckley*, 424 U.S. at 135). The Appointments Clause itself

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[6] The Attorney General's authority under 28 U.S.C. 542 to appoint Assistant U.S. Attorneys has also been delegated to the Deputy Attorney General. 28 C.F.R. 0.15(b)(1)(v).

recognizes that practical reality, by allowing Congress to provide for the President's immediate subordinates in the Executive Branch, the Heads of Departments, to make appointments of inferior Officers. If the Framers had intended to make a special nondelegation exception applicable to the appointment power in that portion of the Appointments Clause, it is reasonable to expect that they would have made that exception express.[7]

We do not suggest by the foregoing discussion that the President may delegate specific powers that are assigned to him directly by the Constitution itself, such as the power to approve or disapprove bills, grant pardons, serve as Commander-in-Chief, or even to nominate, and with the advice and consent of the Senate, to appoint officers covered by the first portion of the Appointments Clause. The text and structure of the Constitution have been understood to contemplate that those powers must be exercised by the President personally. See 7 Op. Att'y Gen. 453, 464-465 (1855); 5 Op. Off. Legal Counsel 91, 93-94 (1981).[8]

The second portion of the Appointments Clause confers power on Congress to assign appointment au-

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[7] The Appointments Clause refers in another phrase to Congress's vesting of the appointment of inferior Officers "in the President alone," but in context that phrase is clearly intended to mean appointment by the President without the advice and consent of the Senate.

[8] Thus, petitioner is incorrect in arguing (Pet. 13) that under the court of appeals' decision, the President could delegate his power to appoint Justices of this Court to the Attorney General. The first portion of the Appointments Clause requires in all instances that Justices, Ambassadors, and other Public Ministers be appointed by the President, with the advice and consent of the Senate.

thority. There is nothing in the text or structure of the Appointments Clause suggesting that when Congress vests appointment authority in a Department Head, that authority may not be delegated to a subordinate official. If the Department Head delegates the appointment authority vested in him by law, the responsibility and accountability for the exercise of that power remains in the Department Head, in accordance with the constitutional design. As the D.C. Circuit put it in *Andrade* v. *Regnery*, 824 F.2d 1253, 1257 (1987): "[I]t is an everyday occurrence in the operation of government for staff members to conceive and even carry out policies for which duly appointed or elected officials take official responsibility. Our government in fact depends on such delegation of responsibility, and it does not offend the Appointments Clause so long as the duly appointed official has final authority over the implementation of the governmental action."

Petitioner points out (Pet. 13-14) that during the debates on the Appointments Clause in the Constitutional Convention, recited in *Buckley*, 424 U.S. at 129-131, and *Morrison* v. *Olson*, 487 U.S. 654, 675 (1988), there was a suggestion by James Madison that what is now the "inferior Officer" portion of the Clause "did not go far enough, in that it did not allow Congress to vest appointment powers in 'Superior Officers below Heads of Departments.'" 487 U.S. at 675 (quoting 2 *Records of the Federal Convention of 1787*, at 627-628 (M. Farrand ed. 1966)). Madison's comment, however, dealt with the situation where Congress itself might seek to vest the appointment authority directly in a subordinate officer, rather than in the Head of the Department. Such a law could significantly interfere with the

Department Head's ability to direct the affairs of his Department, and we agree with petitioner that it would be unconstitutional. See 4 Op. Att'y Gen. 162, 164 (1843); 7 Op. Att'y Gen. 242, 276 (1855); *id.* at 495, 512 (1855); 11 Op. Att'y Gen. 209, 213 (1865); cf. *United States* v. *Mouat*, 124 U.S. 303, 308 (1888); *United States* v. *Smith*, 124 U.S. 525, 532-533 (1888). But it does not follow from that premise that a law vesting authority to appoint inferior Officers directly in the Head of a Department, but allowing the Department Head to delegate that authority as he chooses, suffers from any constitutional flaw. The critical distinction is that a law of the latter sort would preserve the ability of the Department Head to control the affairs of his Department.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STANLEY PLESINSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

I

PETITIONER PLESINSKI IS ENTITLED TO RELIEF IF THE DISTRICT COURT ERRED IN DENYING HIS MOTION TO DISQUALIFY AN UNAUTHORIZED PROSECUTOR

The government argues that the petition should be denied because of the absence of a showing of prejudice due to the participation of Special Assistant United States Attorney Feldman, whose appointment is at issue in this case. The government's suggestion that the Court deny the petition on these grounds and not reach the merits is in violation of the agreed–upon resolution of

this case in the district court and Rule 11(a)(2) of the Federal Rules of Criminal Procedure. This suggestion was rejected by the Court of Appeals which ruled on the merits in this case.

Mr. Plesinski entered a plea of guilty pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. That rule provides as follows:

> **(2) Conditional Pleas.** With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

In this case the issue preserved for appeal was, *inter alia*, whether the district court erred in failing to disqualify Feldman from further participation in the case because of his lack of statutory and Constitutional authorization to represent the United States. Under Rule 11(a)(2), if the district court erred in failing to disqualify Feldman, petitioner is entitled to withdraw his plea of guilty.

As a factual matter, although Feldman alleged that he was acting under the "supervision" of a regular Assistant U. S. Attorney throughout the course of the case, the record shows that Feldman was the main attorney for the government with respect to the investigation, formulation of charges, and prosecution of this case. (ECR 73–75, RT II 45–57)[1] Feldman was the only attorney who worked throughout the case for the government, there being two regular Assistant U.S. Attorneys with whom he consulted in the prosecution of the case.

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[1] "RT" refers to the Reporter's Transcript of district court proceedings.

At the trial of the co-defendant Vinograd, Feldman conducted the case for the government. He made the opening statement, conducted the direct examination of all government witnesses and the cross-examination of all defense witnesses, made the closing argument, and apparently argued almost all,if not all, of the evidentiary issues that arose during trial of the case. In this case it was Feldman alone who represented the government at the time of the main motion hearing. Feldman also was the exclusive representative of the government at the critical sentencing hearing on 3 April 1989, (RT Vol. III) before which he had filed a sentencing memorandum seeking a ten year prison sentence. In short, Feldman was the main representative of the U. S. government in this federal criminal prosecution.[2]

Finally the government's argument, which emphasizes that Feldman was nominally under the direction of the United States Attorney, again fails to deal with the significant issue of whether the district court erred in failing to disqualify him from participation in the case and from representation of the government due to his Constitutionally and statutorily inadequate

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[2] The government asserts in its brief that the evidence, "the sufficiency of which is not under dispute here," shows that from at least 1985 until 1988 petitioner conspired to possess several thousand pounds of Mexican marijuana. (G.B. 2) In addition, the government alleges that in 1988 petitioner accepted delivery of approximately one thousand kilograms of marijuana from a confidential informant. (G.B. 2) The government statement is factually inaccurate. Petitioner pled guilty to count one only of a second superseding indictment which alleged a conspiracy involving events occurring in the years 1984 and 1985. Petitioner never pled guilty to any acts occurring in 1988.

appointment. It is not sufficient to argue that the prosecutor was subject to possible administrative oversight by higher officials. In light of the significant federal power wielded by Feldman himself, whom the Court of Appeals found to be an "inferior officer" under this Court's criteria in *Buckley v. Valeo*, 424 U.S. 1 (1976), *United States v. Nixon*, 418 U.S. 683, 694 (1974), and *Morrison v. Olson*, 487 U.S. 654 (1988), petitioner was entitled to the relief of disqualification upon a showing of the absence of proper authorization. *Cf. Young v. United States ex rel Vuitton Et Fils S.A.*, 481 U.S. 787 (1987) The participation of an unauthorized person, through whose actions petitioner was sentenced to nine years in prison, constitutes "prejudice," in any event.

II

THE APPOINTMENTS CLAUSE REQUIRES REVERSAL OF THE COURT OF APPEALS DECISION IN THIS CASE

The Appointments Clause of the Constitution, Article II, Section 2, Clause 2 provides as follows:

> (The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herinafter otherwise provided for, and which shall be established by law: but the Congress may by Law vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The brief in opposition fails to address adequately the central issue raised in the petition for a writ of certiorari: whether the Constitution requires that an "inferior officer" of the United States be appointed by the head of the department

and whether that power may be delegated to lesser officials consistent with the Appointments Clause. The government's brief raises more questions than it answers. The government concedes that certain powers must be exercised by the President only and may not be delegated:

> We do not suggest by the foregoing discussion that the President may delegate specific powers that are assigned to him directly by the Constitution itself, such as the power to approve or disapprove bills, grant pardons, serve as Commander–in–Chief, or even to nominate, and with the advise and consent of the Senate, to appoint officers covered by the first portion of the Appointments Clause. The text and structure of the Constitution have been understood to contemplate that these powers must be exercised by the President personally. *See* 7 Op. Att'y Gen. 453, 464–465 (1855); 50 Op. Off. Legal Counsel 91, 93–94 (1981)(G.B. 17)

The government argues that a statute passed by the Congress vesting the appointment authority for inferior officers in a subordinate officer below than the head of the department would be unconstitutional. (G.B. 18–19) The government agrees the assignment of responsibilities in an Executive department must be consistent with the Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) (G.B. 15) Nonetheless, after agreeing that the text of the Constitution requires that certain powers be exercised personally by the executive official designated in the text (the President), and agreeing that a statute delegating the power of appointment of inferior officers to a subordinate official below the head of the department would be unconstitutional, the government argues that the four level delegation of the power of appointment in this case, is nonetheless both statutorily authorized and Constitutionally permissible.

The government's analysis of the Appointments Clause is grossly inconsistent. When dealing with the first section of the Appointments Clause, which requires the nomination and appointment of officers of the United States by the President with the consent of the Senate, the government concedes that the Constitution requires that such an act must be done by the President and the President alone and that his power to appoint under the Appointments Clause may not be delegated. (G.B. 17) We suggest that the Appointments Clause must be read consistently throughout. Just as the first section of the Appointments Clause clearly requires that the nomination and appointment of "officers" be done only by the President, the second section, referring to the appointment of inferior officers, requires action by those limited classes of persons in whom the Constitution permits the Congress to vest the power of appointment, specifically the President alone, the courts of law, or the heads of departments. The government's position set forth in its brief in opposition argues a contradictory analysis of the Appointments Clause, unsupported by history or text: the power to appoint "officers" subject to Senate confirmation must be done by the President and is not delegable, but the appointment of "inferior officers," a power to be vested in the President alone, the courts of law, or the heads of departments, may be freely delegated and subdelegated without restriction. A statute passed by Congress reposing the appointment of inferior officers in officials below the head of department is unconstitutional; a regulation or administrative practice doing the same thing is permissible, according to the government, because it "preserves the ability of the Department Head to control the affairs of his Department." (G.B. 19)

The government's position becomes yet more puzzling and inconsistent when one extrapolates its argument to the other portions of the Appointments Clause dealing with the appointment of inferior officers of the United States. For example, although the second portion of the Appointments Clause provides that the Congress may vest the appointment of inferior officers in "the President alone," the government's reading of this portion of the Appointments Clause would presumably permit the President to delegate the appointment of inferior officers required by statute to be appointed by the President alone to lesser officials in the Executive Branch, despite the government's position that the power to appoint "officers" subject to Senate confirmation is not delegable by the President. Thus in order to reach its dubious conclusion the government has propounded the following position: the President when nominating and appointing "officers" of the United States, must act personally and may not delegate such powers. However with respect to the appointment of inferior officers, despite the language of the Clause that the Congress may vest the appointment of such officers "in the President alone" the President may presumably delegate such authority. (G.B. 17, n.1) Under this rationale, despite the holding in *Morrison v. Olson*, 487 U.S. 654 (1988), the government's reasoning would suggest that independent counsel whose appointments are vested in the "courts of law" may be properly appointed by a delegee of the courts. Presumably the government would permit the appointment upon a delegation by an appropriately designated law clerk, member of the bar, or committee.

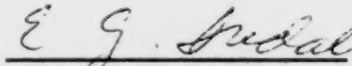
The government fails to respond to the central thesis of petitioner's application, specifically that the Appointments Clause requires the appointment

of certain officials possessing significant federal authority personally by the named officials or entities, in order to insure structural integrity and political accountability. In dealing with the suggestion that inferior officers should be permitted to be appointed by officers below the heads of the department, the Constitutional Convention itself rejected Madison's motion in approving the Appointments Clause. The purpose of the Clause is to insure structural accountability by placing the appointment of officials exercising significant federal authority in specific, identifiable, and highly placed governmental officials. If the Congress could not constitutionally pass a statute vesting the power of appointment in officers below the heads of departments (as the government concedes) then petitioner respectfully submits that the administrative delegation of the appointment power by the head of the department followed by a sub–delegation and another sub–delegation to a fourth echelon employee cannot be Constitutionally permissible. Petitioner agrees with the government that the Executive has broad discretion to delegate the execution of the laws to subordinates. In this limited and highly specific area of appointments however, the Constitution mandates personal action by the President alone, the Courts of Law, or Heads of Departments. As the explicit language of the Appointments Clause and because the debates and votes of the Constitutional Convention make clear, the inferior officer in this case, Mr. Feldman, was not properly authorized to act on behalf of the United States because he was not appointed by the head of the department, the Attorney General. When the Constitution requires a specific act (appointment) be done by a particular official or entity (the President alone, the courts of law, or the heads of departments), then its clear command must be heeded. It means what it says.

The Court of Appeals decision in this case violates the holding of *Buckley* that ". . . any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must therefore be appointed in a manner prescribed by § 2, Clause 2 of that Article" 424 U.S. at 125–126. Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

28 FEBRUARY 1991

Respectfully submitted,



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